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[\*Majors v. Asea Brown Boveri, Inc.\*](#), 96-ERA-33 (ALJ Oct. 1, 1996)

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Date: October 1, 1996

Case No.: 96-ERA-33

**DOUGLAS N. MAJORS**  
COMPLAINANT

against

**ASEA BROWN BOVERI, INC.**  
RESPONDENT

*Appearances:*

Pro Se  
For Complainant

Michael T. Noble, Esq.  
Assistant Chief Counsel  
For the Respondent

Before: **DAVID W. DI NARDI**  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER  
GRANTING SUMMARY JUDGMENT AND DISMISSING COMPLAINT**

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("Act" or "ERA"), and the

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implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees of or applicants for a license from the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The

undersigned scheduled a hearing in New London, Connecticut to begin on September 30, 1996 (ALJ EX 2), and the hearing was CANCELLED by ORDER issued on September 13, 1996. (ALJ EX) The following abbreviations shall be used herein: "ALJ"-Administrative Law Judge Exhibits, "CX"-Complainant Exhibits "RX"-Respondent Exhibits.

### **Summary of the Evidence**

Douglas N. Majors ("Complainant" herein) has filed his complaint seeking the so-called whistle blower protection of the Energy Reorganization Act ("ERA" or the "Act") because he was fired for having engaged in protected activity (**i.e.**, raising safety concerns) at Combustion Engineering Company, now a part of Asea Brown Boveri, Inc. ("ABB").

In his May 30, 1996 Complaint, Complainant states as follows (CX 1):

"I work for Asea Brown Boveri, formerly Combustion Engineering. I have been on long term disability and come to realize that the Company is discriminating against me because of nuclear safety issues I raised while working as a principal nuclear engineer for the Company.

"In 1984, I tried to issue a 10 CFR 21 for safety concerns with operating nuclear power plants. I was not allowed to complete the issuance of this document and was directed to issue info-bulletins instead which later I was also prevented from issuing.

"My evaluation went from exceptional and exceeding requirements in all areas of my job to one of being totally unsatisfactory. I was reassigned to a non-nuclear position where personnel problems continued to mount against me.

"I dissociated in 1985, as a result of these problems with my job, during a neighborhood conflict and was left with post traumatic stress disorder. This resulted in my going on long term disability starting in 1986.

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"As shown in Enclosure (a), the Company cut my long term disability Benefits to offset my Social Security award which came six years after I became disabled. As shown in Enclosure (b), my attorney informed the Company this is in violation of the insurance policy in effect at the time I went on disability. As shown in enclosure (c), my attorney requested the Company to provide the plan-document for the insurance policy in effect when I went on disability and the Company has failed to do so to date.

"The Company has made no effort to return me to work. I asked to return to work under the disability status but the Company has stated through its agent that it has no intention of taking me back. Instead, as may be seen in Enclosure (d), the Company has placed a

stipulation on me stating I must do volunteer work before I pursue competitive work anywhere and makes no mention whether this would lead to my returning to work at ABB. The only motive the Company has is for me to do volunteer work so I return to work elsewhere and lose my disability status. It is not willing to accept responsibility for the fact that it was its nuclear safety issues that caused my disability to start with. This volunteer work' has been made a condition for me to return to work and is not part of the insurance policy in effect when I went on disability.

"In addition, I am a Vietnam Era Veteran. I feel many of the personal problems I experienced in the workplace and my neighborhood as well as the lack of justice that was afforded me to clear my name over the neighborhood incident is because I am a Vietnam Vet. For the Company to stipulate that I do this volunteer work so that I now lose the disability status and the use of my doctor is being irresponsible and reckless. Proof to that is that I had to go back under medication, after being off for six months, just so I could cope with writing this very paragraph. Where would I be without a doctor to fall back on?

"I would appreciate anything your office can do to resolve this problem. The insurance policy states I can file suit in federal court over this matter but I don't have the resources to fight companies like ABB and Travelers and most attorneys will not take the case for that reason." (CX 1)

On the other hand, the Respondent submits that the complaint must be denied because Complainant has failed to file a timely complaint and Respondent has filed a Motion for Summary Judgment, pursuant to 20 C.F.R. Part 18 of our Rules of Practice. In support of the motion, Respondent states as follows, (RX 1):

1. The Complainant, Douglas N. Majors, became a salaried employee of Combustion Engineering, Inc. in 1978.

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2. Complainant notified Respondent that he was mentally disabled from performing his job effective October 15, 1986 (see Attachment 1 to RX 1).

3. In October, 1986, Respondent had a disability plan in effect which was composed of two types of disability coverage:

1. A salary continuation benefit which continued an employee's full pay from the beginning of their disability up to a maximum of 26 weeks, depending on their length of service, and
2. Long- Term disability Benefits which continued a portion of the employee's pay if they were disabled for more than 26 weeks.

The details of these Benefits were set forth in the Combustion Engineering - Life, Disability and Medical plan for Salaried Employees Summary Plan Description, pp. 9-11

(see Attachments 2 and 3). Copies of Attachment 3 were distributed to all salaried employees on or about July, 1984 (see back cover of Attachment 3).

5. In attachment 3, the Long-Term Disability Benefits are as follows:

**Benefit Amount<sup>1</sup>**

Long Term Disability Benefits will pay you 60% *of your monthly salary, reduced by* certain other types of income you receive during your disability - such as:

- salary or other compensation payments you are entitled to receive from the Company
- periodic cash payments payable as a result of your disability under any plan sponsored by the Company or to which the company makes contributions

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- disability Benefits payable under the provisions of any applicable state or federal law
- periodic cash payments which *you or any of your dependents* are entitled to receive from

- any Combustion Engineering retirement plan
- Social Security
- the Railroad Retirement Act
- Workers' Compensation law

*and*

- from any federal, state, municipal or other governmental agency.

However, regardless of the other disability income you receive, in no event will the monthly benefit payable to you from the Long Term Disability part of the Plan be less than \$50.

For purposes of determining your Long Term Disability Benefits, your *monthly salary* is equal to one-twelfth of your annual salary as described on page 8 for Life and AD&D Insurance.

When you apply for Long Term Disability Benefits, you will be required to submit proof of your disability, as well as proof that you have applied for any other sources of disability income to which you may be entitled, as listed above. Once your monthly Long Term Disability Benefits is determined, any increases in your other sources of income will *not* affect the Benefits you are receiving from this Plan. In fact, they will add to the total amount of disability income you receive.

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6. Attachment 3 was in effect from 1984 to 1989 and the reduction of Long-Term Disability Benefits by amounts received from social security has remained unchanged to present (see Attachment 2 and 4).

7. In 1990, Combustion Engineering, Inc. was acquired by Asea Brown Boveri Inc. and Asea Brown Boveri Inc. continued the Long-Term Disability Benefits unchanged.

8. On April 24, 1987, Complainant was sent a Long-Term Disability Benefits application along with a cover letter (see Attachment 5) specifically stating that the Long-Term Disability Plan provided that Company-paid Benefits would be reduced by any Social Security Disability Benefits received (note the year on Attachment 5 is incorrectly typed in as 1986).

9. On April 29, 1987, Complainant returned the completed Long-Term Disability application (see Attachment 6) sent with Attachment 5 to the Company requesting Long-Term Disability Benefits. On Attachment 6, Question 28 asks whether the claimant is entitled to disability Benefits from a variety of sources, including specifically the Social Security Administration. On Attachment 6, in the Authorization and Assignment section directly above the Complainant's signature, the application states, "I hereby agree to refund any monies due the Plan as a result of payment of disability Benefits from any source listed in Item 28 above." Complainant completed and signed Attachment 6 and, thus, had additional knowledge on April 29, 1987 that his Long-Term Disability Plan provided that Company-paid Benefits would be reduced by any Social Security Disability Benefits he received.

10. On or about June 2, 1987, Complainant received notice that his application for Long-Term Disability from the Company had been approved (see Attachment 7). The letter of approval states that Social security Disability Benefits, if received, are to be deducted from the Long-Term Disability Benefits and that overpayment of Long-Term Disability Benefits due to retroactive awards of Social Security Disability Benefits must be refunded. Thus, Complainant had additional knowledge on or about June 2, 1987 that the Long-Term Disability Plan provided that Benefits would be reduced by any Social Security Disability Benefits he received.

11. Complainant's initial claim for Social Security Disability was denied (see Attachment 8), and the Respondent's insurance company became aware of this denial several years later (see Attachment 9).

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12. On May 13, 1991, its insurance carrier, who administered the Long-Term Disability plan, wrote to Complainant offering to assist in his appeal or reapplication for Social Security Disability Benefits (see Attachment 9). In that letter it was stated to Complainant:

Although Benefits under our plan are normally offset by Social Security Benefits, the Social Security benefit amount which we deduct in most cases is usually at the level of the initial award. Subsequent periodic Social Security benefit increases do not result in an increase in the offset amount. This allows you to receive the full advantage of periodic increases in the Social Security benefit.

Thus, on or about May 13, 1991, Complainant was again informed that his Long-Term Disability Plan provided that Company-paid Benefits would be reduced by and Social Security Disability benefit he received.

13. On May 17, 1991, Complainant wrote to the Travelers Insurance Company acknowledging receipt of the May 13, 1991 (see Attachment 9) letter and declined to reapply for Social Security Disability Benefits at that time (see Attachment 10).

14. On May 26, 1993, Complainant wrote to the Travelers Insurance Company with several questions relative to his status and benefits (see Attachment 11), specifically: whether he was required to perform volunteer work as a prerequisite to beginning rehabilitation processes; whether the Company was required to provide him employment upon completion of a rehabilitation program; and whether or not his Long-Term Disability Benefits would be reduced by an award of Social Security Disability Benefits related to his disability and rendered subsequent to his initial receipt of Long-Term Disability Benefits. Complainant included with that letter, a copy of the cover and page 10 of Attachment 3 and quoted a small portion of the benefits section page, which is quoted in its entirety in Paragraph 5 herein.

15. On July 15, 1993, Complainant's May 26, 1993 letter was answered by the Travelers Insurance Company (see Attachment 12), stating that: Rehabilitation and expenses were voluntary and that volunteer work was, as its term states, voluntary'; that the Travelers had no opinion as to his re-employment; that the receipt of Social Security Disability Benefits was taken into consideration in determining the Long-Term Disability Benefits due; and that the portion of the disability language he had referred to in his letter meant that subsequent cost-of-living increases to monthly Social Security Disability Benefits were not deducted from Company-paid benefits. Thus, on or about July 15, 1993, Complainant was again informed that his Long-Term Disability Plan provided that company-paid benefits would be reduced by any Social Security Disability Benefit he received (cost-of-living increases excepted).

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16. On August 16, 1993, the Complainant's case manager at Travelers Insurance Company sent the Complainant additional correspondence (see Attachment 13) explaining in detail why and how his Long-Term Disability Plan provided that Social Security Disability awarded to him would be offset against his Long-Term Disability Benefits and quoted the applicable sections of the same Summary Plan Description Complainant had referred to in his letter (see Attachment 11). Thus, on or about August

16, 1993, Complainant was again informed that his Long-Term disability Plan provided that company-paid benefits would be reduced by any Social Security Disability Benefits he received.

17. On September 27, 1993, Complainant wrote to Ms. R. Da Silva (Attachment 14) at Asea Brown Boveri, Inc., reiterating the questions of his May 26, 1993 letter (Attachment 11).

18. Ms. Da Silva replied on October 15, 1993, (Attachment 15), again informing complainant that the rehabilitation plan was voluntary, that voluntary work is not mandatory, that the Americans with Disabilities Act was applicable to him and that the Long-Term Disability Plan provided that Social Security Disability Benefits (but not cost-of-living increases) would be an offset against his Company-paid Long-Term Disability Plan provided that his Company-paid Benefits would be reduced by any Social Security Disability Benefit he received.

19. On October 7, 1993, Travelers wrote to Complainant notifying him that they were aware that Social Security Disability Benefits had been awarded to him retroactive to August, 1992 and that those Benefits were being credited as an offset against the Long-Term Disability Benefits he had received from the Company pursuant to the Long-Term Disability Plan (see Attachment 16). Thus, Complainant was again informed that his Long-Term Disability Plan provided for such reduction and that his Benefits would be reduced by and Social Security Disability benefit he had received.

20. Over two and one-half years later, on June 20, 1996, Complainant, by letter dated May 30, 1996, filed a complaint in letter form alleging violations of the Energy Reorganization Act (ERA). In that letter Complainant alleges that in 1984, he was prevented from issuing a 10 CFR 21 regarding nuclear safety.<sup>2</sup> His complaint is that in retaliation for his actions in 1984 that Respondent did the following in 1993:

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1. Offset his Long-Term Disability Benefits by the amount of his Social Security Disability Benefits, and
2. Notified him that he was required to perform volunteer work.

21. On June 26, 1996, the District Director dismissed Complainant's charge as untimely. (ALJ EX 1)

22. The Complainant timely appealed the District Director's dismissal by telegram. (CX 2)

On the basis of the totality of this closed record, especially Respondent's affidavits, I make the following:

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

## APPLICABLE LAW - - DISCUSSION

The employee protection provision of the Act provides that:

- (a) **Discrimination against employee.** (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)-
- (A) notified his employer of an alleged violation of the Act . . . ;
  - (B) refused to engage in any practice made unlawful by this Act . . . if the employee has identified the alleged illegality to the employer;
  - (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act . . . ;
  - (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act . . . or a proceeding for the administration or

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enforcement of any requirement imposed under this Act. . . .;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act . . . .

42 U.S.C.S. § 5851 (Supp. May, 1993).

### **A. The Complaint Was Not Filed Within 180 Days of the Alleged Violation.**

1. It is well-settled that the Energy Reorganization Act requires the filing of complaints within 180 days of the alleged violation.<sup>3</sup> The administrative filing period for a complaint under the Energy Reorganization Act begins to run as of the date the individual is given definite notice of the decision they are seeking to contest. **English v. Whitfield**, 858 F.2d 957, 961 (4th Cir. 1988).

2. Complainant first had knowledge that any Long-Term Disability Benefits would be reduced by an award of Social Security Disability Benefits when, as a salaried employee, he received a copy of the Summary Plan Description (Attachment 3) in 1984. The Long-Term Disability plan specifically provides for the reduction.<sup>4</sup>

3. Over a period of ten years (1986-1996) Complainant was repeatedly apprised of the terms of the Long-Term Disability plan regarding the reduction of Company-paid Long-Term Disability Benefits by any amount received from Social Security.

4. On October 7, 1993, Complainant was notified that an offset of Long-Term disability Benefits was being put into effect based on his award of Social Security Disability Benefits (see Attachment 16).



5. In May, 1993, Complainant alleged that he was being required to perform volunteer work (Attachment 11). In July, 1993, he was informed that volunteer work was not mandatory (Attachment 12). Nonetheless, in September, 1993, he reiterated that allegation (see Attachment 14) and was again informed in October, 1993 that no volunteer work was required of him (Attachment 15). He has never been required to perform any volunteer work.

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6. If the Complainant's allegations that the insurance companies used Social Security Disability Benefits to offset his Long-Term Disability benefit and required him to perform volunteer work in retaliation for his having attempted to issue a 10 C.F.R. 21 were true (and Respondent denies that they are true), those alleged violations occurred several years before he filed his complaint in June, 1996.

**B.**

**The Long-Term Disability Benefit Plan Specifies the Reduction of Company-Paid Benefits by the Amount of Social Security Disability Benefits.**

1. The enclosed documentation including the Long-Term Disability Benefits Summary Plan Description and voluminous documentation both to and from the Complainant over the ten years since the onset of his disability, clearly establishes that the amount of Long-Term Disability Benefits are to be reduced by any award of Social Security Disability Benefits. This reduction has occurred in every instance where a Long-Term Disability recipient has received Social Security Disability benefits.

2. It is equally clear from the absence of evidence to the contrary that Complainant never raised any allegation of retaliation with either of the two national insurance companies administering the Long-Term Disability Benefits over the last ten years, or with the Company Benefits personnel, or at any time prior to May 30, 1996 did he ever attribute any decision of John Hancock Insurance Company personnel, Travelers Insurance Company (Attachment 14) and was again informed in October, 1993 that no volunteer work was required of him (Attachment 15). He has never been required to perform any volunteer work.

3. If the Complainant's allegations that the insurance companies used Social Security Disability Benefits to offset his Long-Term Disability benefit and required him to perform volunteer work in retaliation for his having attempted to issue a 10 C.F.R. 21 were true (and Respondent denies that they are true), those alleged violations occurred several years before he filed his complaint in June, 1996.

**C.**

**The Long-Term Disability Benefit Plan Specifies the Reduction of Company-Paid Benefits by the Amount of Social Security Disability Benefits.**

1. The enclosed documentation including the Long-Term Disability Benefits Summary Plan Description and voluminous documentation both to and from the Complainant over the ten years since the onset of his disability, clearly establishes that the amount of Long-Term Disability Benefits are to be reduced by any award of Social Security Disability Benefits. This reduction has occurred in every instance where a Long-Term Disability recipient has received Social Security Disability Benefits.

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2. It is equally clear from the absence of evidence to the contrary that Complainant never raised any allegation of retaliation with either of the two national insurance companies administering the Long-Term Disability Benefits over the last ten years, or with the Company Benefits personnel, or at any time prior to May 30, 1996 did he ever attribute any decision of John Hancock Insurance Company personnel, Travelers Insurance Company personnel or the Company employees regarding his Long-Term Disability Benefits to any alleged retaliation.

3. The amount of Complainant's Company-paid Long-Term Disability Benefits is determined by the Long-Term Disability Benefits Plan. The Plan specifies that the Company paid Benefits be reduced by Social Security Disability Benefits received and the plan has been consistently administered in that manner with regard to all the employees who have received Benefits pursuant to it. The reduction of Complainant's benefits by the amount received from Social Security was not due to any alleged protected activity.

**D.** While summary judgment may seem, at first blush, an unusually harsh result, the undersigned is not empowered to ignore the congressionally imposed limitation period for filing a whistleblower complaint. **School District of Allentown v. Marshall**, 657 F.2d 16,30 (3d Cir. 1981)(the choice of the appropriate time for filing such claims is not entrusted to the undersigned. It is the result of legislative determinations made after weighing the various interests at stake. Obviously, Congress intended that complaints be made and resolved within a very short time after the alleged violation occurred). **See also Rose v. Dole**, 945 F.2d 1331 (6th Cir. 1991) (**per curiam**).

Complainant cannot avoid the time constraints for filing his complaint by attempting to submit new allegations on a time-barred claim of discriminatory discharge. **Howard v. TWA**, 91-ERA-36 9Sec'y Jan. 13, 1993). The time limitations commence on the date that the complainant is informed of the challenged employment decision rather than at the time the effects of the decision were ultimately felt. **See Howard v. TWA**, 90-ERA-24 (Sec'y July 3, 1991), **aff'd sub nom., Howard v. U.S. Department of Labor**, 959 F.2d 234 (6th Cir. 1992); **English v. Whitfield**, 858 F.2d 957, 961-962 (4th Cir. 1988);

**Janikowski v. Bendix Corp.**, 823 F.2d 945, 947 (6th Cir. 1987); **Ray v. TWA**, 88-ERA-14 (Sec'y Jan. 25, 1991).

The **Ricks-Chardon** rule has been applied to whistleblower complaints and this rule states that the proper focus in assessing time-bar

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defenses is the time of the challenged conduct and its notification rather than the time its painful consequences are felt. **Chardon v. Fernandez**, 454 U.S. 6, 102 S.Ct. 28 (1981); **Delaware State College v. Ricks**, 449 U.S. 250, 101 S.Ct. 498 (1980). Moreover, the period for filing a whistleblower complaint commences on the date the complainant receives unequivocal notice of his or her suspension or termination from employment. **Tracy v. Consolidated Edison Co. of New York, Inc.**, 89-CAA-1 (Sec'y July 8, 1992).

An examination of Complainant's complaint (CX 1) does not demonstrate affirmative misleading or deceptive conduct by Respondent that would justify tolling of the time limits for filing his complaint. See **Dillman v. Combustion Engineering, Inc.**, 784 F.2d 57, 60 (2d Cir. 1986); **Tracy**, *supra*, slip op. at 607 and cases cited therein. Moreover, the principles of equitable tolling operate independently of the continuing violation doctrine. **Egenrieder v. Metropolitan Edison Co.**, 85-ERA-23 (Sec'y apt. 20, 1987). Complainant does not allege, and the record cannot establish, a pattern of continuing violations of the ERA, thereby allowing this Administrative Law Judge to invoke the well-settled principle of equitable tolling.

Charging periods in whistleblower cases are subject to equitable modification. For example, employers have been estopped from claiming the defense of untimely filing where they have induced or lulled an employee into not filing promptly. Estoppel also may be appropriate if failure to file timely results from a deliberate design by the employer or from actions that the employer unmistakably should have understood would cause the employee to delay filing. In such circumstances, an employee may be aware of his or her statutory cause of action but fails to file timely due to his or her reasonable reliance on the employer's misleading or confusing representations or conduct. Modification of the filing period thus serves as a corrective mechanism. Some circumstances which have precipitated estoppel are:

- an employer's "positive signals" regarding amicable resolution,
- false assurances by an employer that it intends to settle the claim,
- an employer's failure to provide agreed upon information, and
- an employer's misrepresentation as to reasons for its employment action or misinformation as to employee rights.

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**Larry v. Detroit Edison Co.**, 86-ERA-32 (Sec'y June 28, 1991).

See also **School Dist. of Allentown v. Marshall**, 657 F.2d 16 (3d Cir. 1981); **English v. Whitfield**, 858 F.2d 957 (4th Cir. 1988); **Rose v. Dole**, 945 F.2d 1331 (6th Cir. 1991)(per curiam).

The restrictions on equitable tolling must be scrupulously observed. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious cause. **Doyle v. Alabama Power Co.**, 87-ERA-43 (Sec'y Sept. 29, 1989) (citing **School District of the City of Allentown v. Marshall**, 657 F.2d 16, 19-10 (3d Cir. 1981)).

In **Doyle**, the complainant asserted that he was misled by federal government officials about his right to file a complaint.

In some circumstances, where there is a complicated administrative procedure, and an unrepresented, unsophisticated complainant receives misleading information from the responsible government agency, a time limit may be tolled. See, e.g., **Page v. U.S. Industries, Inc.**, 556 F.2d 346, 351 (5th Cir. 1977); **Kocian v. Getty Refining & Marketing Co.**, 707 F.2d 748, 754 n.9 (3d Cir. 1983), cert. denied, 464 U.S. 852 (1983); **Roberts v. Arizona Board of Regents**, 661 F.2d 796, 800 (9th Cir. 1981); **White v. Dallas Independent School District**, 581 F.2d 556, 562 (5th Cir. 1978). However, in **City of Allentown v. Marshall**, (the only Court of Appeals decision on equitable tolling at that time under an analogous 29 C.F.R. Part 24-type whistleblower provision), the complainant contacted the Environmental Protection Agency, which first offered to advise him about filing a complaint and then delayed doing so. The court held that "[t]he alleged confusion at the EPA is . . . irrelevant." 657 F.2d at 21. The court distinguished situations in which "the defendant has actively misled the plaintiff respecting the cause of action", 657 F.2d at 20, where the tolling may be justified, from cases where a government agency may have given confusing information but the defendant "was in no way responsible for [plaintiff's] failure to file a complaint within the statutory period." 657 F.2d at 20-21.

The Secretary found that the circumstances presented in **Doyle** were insufficient to invoke equitable tolling. The requirements for filing a complaint and the time limit under the ERA and 29 C.F.R. Part 24 are straightforward. The record indicated that the complainant was aware of the 30 day time period for a number of years, and had, at most, received some incorrect information from Department of Labor officials about its applicability to a blacklisting ocmplaint -- information for which the

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respondent was not responsible. Several times between 1983 and 1987 the complainant believed he was being blacklisted, but did not file a complaint.

Five factors to be considered in determining whether equitable tolling is appropriate in a given case are:

- (1) whether the plaintiff lacked actual notice of the filing requirements;
- (2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known;
- (3) the diligence with which the plaintiff pursued his rights;
- (4) whether there would be prejudice to the defendant if the statute were tolled; and
- (5) the reasonableness of the plaintiff remaining ignorant of his rights. Ignorance of the law alone is not sufficient to warrant equitable tolling.

Where the complainant waited 54 days after discharge to consult an attorney, purportedly because he was waiting to hear about his unemployment application and because he went on vacation with his son, the delay was not excusable. Where there was no evidence that the complainant was prevented from investigating his rights within the statutory period, by his own admission he suspected that his firing was for shistleblowing activity, and he was not later made aware of any new facts which he was not previously aware of with regard to his firing, absent some evidence that he was somehow deterred from seeking legal advice by his employer, equitable tolling is not warranted. **Rose v. Dole**, 945 F.2d 1331 (6th Cir. 1991) (per curiam).

Filing periods are subject to equitable modification. **Zipes v. Transworld Airlines, Inc.**, 455 U.S. 385, 393 (1982). Generally, the doctrines of equitable estoppel and equitable tolling are mechanisms for modifying a limitations period. See **Clark v. Resistoflex Co.**, 854 F.2d 762, 768-769 (5th Cir. 1988); **Kale v. Combined Ins. Co. of America**, 861 F.2d 746, 752 (1st Cir. 1988). Respondents may be equitably estopped from claiming the time bar defense where they have induced or deliberately misled an employee into neglecting to file promptly. **Clark** at 769 n.4; **Felty v. Graves-Humphreys Co.**, 785 F.2d 516, 519 (4th Cir. 1986); **Larry v. The Detroit Edison Co.**, 86-ERA-32 (Sec'y June 28, 1991), slip opl at 12-19, **aff'd sub nom. The Detroit Edison Co. v. Secretary, United States Dept. of Labor**, No. 91-3737 (6th Cir. Apr. 17, 1992) (unpublished) (available at 1992 U.S. App. LEXIS 8280). The doctrine of equitable tolling focuses on the complainant's excusable ignorance

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as a reason to modify the limitations period. **Clark** at 769, n.4; **Cf. Andrew v. Orr**, 851 F.2d 146, 150 (6th Cir. 1988) (doctrine of equitable tolling applies when employee misses filing deadline because of affirmative misleading conduct by employer or ineffective but diligent conduct by employee).

Courts generally have held that unless the employer has acted deliberately to deceive, mislead or coerce the employee into not filing a claim in a timely manner, equitable estoppel will not apply. See **English v. Whitfield**, 858 F.2d 957, 963 (4th Cir. 1988); **Clark v. Resistoflex Co.**, 854 F.2d at 768-769. Moreover, the doctrine of equitable tolling is narrowly applied. See generally **Electrical Workers v. Robbins & Myers, Inc.**, 429 U.S. 229, 236-240 (1976); **City of Allentown**, 657 F.2d at 19-21; **Symmes v.**

**Purdue University**, 87-TSC-5 (Sec'y Mar. 10, 1992), slip op. at 2-3; **Garn v. Benchmark Technologies**, 88-ERA-21 (Sec'y Sept. 25, 1990), slip op. at 7-8; **Billings v. Tennessee Valley Authority**, 86-ERA-38 (Sec'y June 28, 1990), slip op. at 9-10; **Doyle v. Alabama Power Co.**, 87-ERA-43 (Sec'y Sept. 29, 1989), slip op. at 2-6, **aff'd**, **Doyle v. Secretary, U.S. Dept. of Labor**, 949 F.2d 1161 (11th Cir. 1991), **cert. denied**, 113 S. Ct. 225, 121 L. Ed. 2d 162 (1992) (unpublished 11th Cir. decision available at 1991 U.S. App. LEXIS 29326).

In **Tracy v. Consolidated Edison Co. of New York, Inc.**, 89-CAA-1 (Sec'y July 8, 1992), a summary decision dismissing the complaint as untimely was appropriate where the complainant failed to raise a genuine issue of material fact concerning his allegation that equitable tolling was warranted because he was misled by the respondent, even taking the complainant's evidence in the light most favorable to the complainant.

In response to the motion for summary decision, the complainant, in another case, submitted an affidavit alleging that post-suspension, and after the union filed a grievance to initiate arbitration, a union representative initiated a discussion with management over the complainant's situation and that the management representative indicated the Union should not take further action because the matter was being resolved. This evidence did not indicate that the respondent deliberately sought to mislead or delay the complainant from filing a CAA claim, but rather that the union approached the respondent and was involved in negotiation and arbitration on the complainant's behalf. **See Electrical Workers v. Robbins**, 429 U.S. at 236-240 (employee's pursuit of internal grievance procedure set up in collective bargaining agreement does not toll filing requirement); **Ackison v. Detroit Edison Co.**, 90-ERA-38, slip op. at 2 (complainant's use of internal grievance procedures does not toll filing period); **In Pfister v. Allied Corp.** 539 F. Supp. 224, 227 (S.D.N.Y. 1982) (employer's participation in settlement discussions does not toll statute of limitations for filing action over

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discharge because no evidence acted in bad faith or deceitfully lured plaintiff to miss appropriate filing date).

Furthermore, the complainant was represented by counsel during this period and immediately filed a grievance and an identical whistleblower complaint under the OSHA, which further supported a finding that the complainant cannot invoke equitable tolling under the circumstances. **See generally Kent v. Barton Protective Services**, 84-WPC-2 (Sec'y Sept. 28, 1990), slip op. at 11-12, **aff'd Kent v. United States Dept. of Labor**, No. 90-9085 (11th Cir. Oct. 3, 1991); **McGarvey v. E G & G Idaho, Inc.**, 87-ERA-31 (Sec'y Sept. 10, 1990), slip op. at 3-4; **Symmes**, 87-TSC-5, at 2-3, and appended ALJ's R.D. & O. at 608.

Hence, the evidence established that the complainant was given final and unequivocal notice of his immediate suspension and promptly proceeded to pursue his remedies with



the assistance of the union and his counsel -- not that the respondent deliberately mislead the complainant. **Tracy, supra.**

Employee filed suit under Employee Protection section of ERA alleging she was unlawfully subjected to employment related discrimination because she registered and pursued safety complaints against her employer, GE, with the NRC. The Secretary dismissed her claim as untimely under Section 5851 (b)(1). Employee attempted to invoke equitable estoppel to avoid the bar of untimely filing. The court recognized the application of those principles in the appropriate case, but held that this was not such a case. The court cited the rule under the ADEA which was laid down in **Price v. Litton Business Systems, Inc.**, 694 F.2d 963 (4th Cir. 1982). In **Price**, the court held that the invocation of equitable estoppel required a showing that an employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." **Id.** at 965. Thus, "[a]bsent evidence that the employer acted to deceive the employee as to the existence of its claim or otherwise to mislead or coerce the employee into not filing a claim in a timely fashion, we will not find the employer equitably estopped to plead the bar of untimely filing." **English**, at 963. In the instant case, the employee pointed out GE's repeated reassurances that permanent placement was being sought elsewhere in the company, and that a GE executive assured her that GE did not intend to fire her in support of her claim of equitable estoppel. However, the court noted that there was no suggestion that it was a **quid pro quo** for forbearance from suit, and the **quid pro quo** is the critical element which gives rise to estoppel under their rule. **English v. Whitfield**, 858 F.2d 957, 963 (4th Cir. 1988).

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Moreover, it is well settled that ignorance of the ERA filing period alone is not sufficient to warrant equitable tolling. **See Rose v. Dole**, 945 F.2d 1331, 1335 (6th Cir. 1991); **English v. Whitfield**, 858 F.2d 957, 963 (4th Cir. 1988); **School District of the City of Allentown v. Marshall**, 657 F.2d 16, 21 (6th Cir. 1981). **Hancock v. Nuclear Assurance Corp.**, 91-ERA-33 (Sec'y Nov. 2, 1992), slip op. at n3. Ignorance of legal rights, or failure to seek legal advice, does not toll a statute of limitations. Regardless of actual knowledge, "everyone is charged with knowledge of the United States Statutes . . . ." **Federal Crop Insurance Corp. v. Merrill**, 332 U.S. 380, 384-85 (1947). **Billings v. Tennessee Valley Authority**, 86-ERA-38 (Sec'y June 28, 1990).

The doctrine of equitable tolling is narrowly applied and focuses on the complainant's excusable ignorance of his or her statutory rights as a reason to modify the limitations period. **See Kale v. Combined Insurance Company of America**, 861 F.2d 746, 752 (1st Cir. 1988); **Andrews v. Orr**, 851 F.2d 146, 150-151 (6th Cir. 1988); **School District of the City of Allentown v. Marshall**, 657 F.2d 16, 19-20 (3d Cir. 1981); **Tracy v. Consolidated Edison Co.**, 89-CAA-1 (Sec'y July 8, 1992), slip op. at 5-8. Ignorance of the filing requirements under the ERA and failure to read the notice posted by the

employer, are not sufficient to toll the filing period and excuse the untimely filing of a complaint. See **Kale** at 753-754; **School District of Allentown** at 19-20.

**Harrison v. Stone & Webster Engineering Corp.**, 91-ERA-21 (Sec'y Oct. 6, 1992).

The restrictions on equitable tolling must be scrupulously observed. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious cause. **Doyle v. Alabama Power Co.**, 87-ERA-43 (Sec'y Sept. 29, 1989) (citing **School District of the City of Allentown v. Marshall**, 657 F.2d 16, 19-20 (3d Cir. 1981)).

In **Doyle**, the complainant asserted that he was misled by federal government officials about his right to file a complaint.

Where the complainant argued for a waiver of the ERA's statute of limitations "in the interest of justice", the Secretary stated that such waiver or equitable tolling is an extraordinary remedy and is not a method to preserve a claim

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"out of a vague sympathy for particular litigants." "**Billings v. Tennessee Valley Authority**, 86-ERA-38 (SEC'Y June 28, 1990), quoting **Baldwin County Welcome Center v. Brown**, 466 U.S. 147, 152 (1984), and also citing **Barnes v. Hillhaven Rehabilitation & Convalescent Center**, 686 F. Supp. 311, 314 (N.D. Ga. 1988).

With reference to the existence of a continuing violation, the cases are noteworthy for an inquiry as to whether the complaint involves a single, discrete act or acts of a continuing nature. For example, the secretary, after first considering when the complainant received unequivocal, final notice, and finding that it occurred on January 12, the Secretary considered whether the circumstance fit under a continuing violation theory. The Secretary, after first considering when the complainant received unequivocal, final notice, and finding that it occurred on January 12, considered whether the situation fit under a continuing violation theory. The Secretary found that all of the incidents recited by the complainant were clearly separate and distinct and not acts of a continuing nature. See **Green v. Los Angeles County Superintendent of Schools**, 883 F.2d 1472, 1480-81 (9th cir. 1989); **London v. Coopers & Lybrand**, 644 F.2d 811, 816 (9th Cir. 1981); **Helmstetter v. Pacific Gas & Electric Co.**, 595 F.2d 711 (D.C. Cir. 1979). **Doyle v. Alabama Power Co.**, 87-ERA-43 (Sec'y Sept. 19, 1989).

Courts generally recognize an equitable exception to statutory limitations periods for continuing violations " [w]here the unlawful employment practice manifests itself over time, rather than as series of discrete acts." The courts in **Malhotra v. Cotter & Co.** 885 F.2d 1305, 1310 explained:



What justifies treating a series of separate violations as a single continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment. **See also Waltman v. Int'l Paper Co.**, 875 F.2d 468, 474 (5th Cir. 1989), quoting **Abrams v. Baylor College of Medicine**, 805 F.2d 528, 532 (5th cir. 1986).

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A compelling case might be made for the presence of a continuing violation, however, where a respondent engages in a systematic practice of denying promotion opportunities and other Benefits. **See Tyson v. Sun Refining & Marketing Co.**, 599 F.Supp. 136, 138-140 (E.D. Pa. 1984), and cases discussed therein. Evidence of discriminatory actions antedating the filing period but found not to be "continuing" violations nevertheless may constitute relevant background evidence, i.e., "[e]vidence of past practices may illuminate ... present patterns of behavior." **Malhotra v. Cotter & Co.**, supra at 1310. Accordingly, earlier violations properly bear on questions of Respondent's later motivation, even if the associated claims are untimely.

However, where incidents are clearly separate and sufficiently permanent to trigger the complainant's awareness of the respondent's alleged discrimination, the continuing violation theory does not preserve the timeliness of the complainant's claim. **Eisner v. United States Environmental Protection Agency**, 90-SWD-2 (Sec'y Dec. 8, 1992). to support a continuing violation theory, the complainant must allege a separate discriminatory act occurring within the limitations period. **See Egenrieder v. Metropolitan Edison Co.**, 85-ERA-23 (Sec'y Apr. 20, 1987), slip op. at 3-8. General allegations of continuing discrimination are not sufficient to establish a continuing violation and preserve the timeliness of a complaint.

**Howard v. Tennessee Valley Authority**, 91-ERA-36 (Sec'y Jan. 13, 1993).

A claim of continuing violation cannot be considered where the complainant has not provided any factual evidence, through affidavits or otherwise, which would indicate a factual issue precluding dismissal on the basis of the respondent's summary judgment motion. Under the continuing violation doctrine, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." **Delaware State College v. Ricks**, 449 U.S. 250, 257 (1980).

Thus, where a Complainant offers nothing besides the conclusory phrase "continuing violation" in support of a tolling of the statute, and pertinent factual information of a discriminatory act or acts during the limitations period had not been submitted to buttress this theory, the Administrative Law Judge correctly dismissed the Complainant's action on the basis of summary judgment. **Billings v. Tennessee Valley Authority**, 86-ERA-38 (Sec'y June 28, 1990).

In view of the foregoing, I am constrained to find and conclude that the May 30, 1996 complaint filed by the Complainant must be **DISMISSED** as untimely filed. Complainant, who began to work for Combustion Engineering (now ABB) in 1978, ceased active employment on October 15, 1986 as he was mentally disabled from performing his job. He then received his salary under the company's wage continuation plan and such salary continued for 26 weeks and he then began to receive long-term disability benefits. He was clearly on notice, as of October, 1986, that such benefits would be reduced to offset the receipt of Benefits from any other source, such as the Social Security Administration. (See Attachment 3) Complainant not only was aware of such offset provision, he agreed in writing "to refund any monies due the Plan as a result of payment of disability benefits from any source listed in Item 28 above." (See Attachment 6) Complainant has periodically been advised by Respondent that the offset provision was still in effect even though ABB acquired Combustion Engineering, Inc., in 1990.

Complainant, mindful of the potential offset, declined to apply for SSA disability benefits in May of 1991. (See Attachment 6) Complainant has periodically been advised by Respondent that the offset provision was still in effect even though ABB acquired Combustion Engineering, Inc., in 1990.

Complainant, mindful of the potential offset, declined to apply for SSA disability benefits in May of 1991. (See Attachment 10) He was again told of the offset in July of 1993, at which time he was receiving SSA disability benefits (See Attachment 12) and he was again told in August of 1993 about the offset. (See Attachment 11) Complainant was again told about the offset by Ms. R. Da Silva (Attachments 14, 15) and Travelers Insurance Company, on October 7, 1993, wrote Complainant that they were aware that Social Security disability benefits had been awarded to him retroactive to August, 1992 and that those Benefits were being credited as an offset against the Long-Term Disability Benefits he was receiving from the company. (See Attachment 16) Complainant did not file his complaint until May 30, 1996.

As can be seen, Complainant sat on his rights from 1984 to May 30, 1996. Thus, his complaint clearly is untimely.

This Administrative Law Judge, viewing the evidence most favorably toward Complainant, as I must as Respondent has filed a **Motion for Summary Judgment** herein, finds and concludes that any discriminatory treatment or retaliation began at least as of October 15, 1986, during which time the thirty day statute of limitations was in effect, that even viewing the receipt of Long Term Disability Benefits as a form of equitable estoppel, during which time he was "lulled" into not filing

a complaint, or viewing such receipt as a continuing violation, Complainant's cause of action arose on or about July 15, 1993, at which time he was told, *inter alia*, about the offset provision as affecting his Long Term Disability Benefits. As of that date, the statute of limitation had been increased to 180 days and, nevertheless, Complainant waited until May 30, 1996 to file his complaint, clearly an untimely filing. I also note that complainant was represented by an attorney until at least July 18, 1996, at which time the attorney advised Mr. Noble that she "will not be representing Mr. Majors" at the hearing scheduled for September 30, 1996 but she concluded her letter with the remark, "it might be helpful if you could obtain the full disability plan in effect at the time he was first declared disabled." (RX 3)

Although a pro se complainant cannot be held to the same standard for pleadings as if he were represented by legal counsel, the complainant must allege a set of facts which, if proven, could support his claim of entitlement to relief. **Doyle v. Bartlett Nuclear Services**, 89-ERA-19 (Sec'y May 22, 1990); **Riden v. Tennessee Valley Authority**, 89-ERA-49 (Sec'y July 18, 1990). As discussed above, I find and conclude that Complainant has not alleged a set of facts which, if proven, could support his claim of entitlement to relief.

### **RECOMMENDED ORDER**

On the basis of the foregoing, I recommend that the complaint filed by Douglas N. Majors shall be, and the same hereby is **DISMISSED**.<sup>5</sup>

**DAVID W. DI NARDI**  
Administrative Law Judge

Dated: October 1, 1996

Boston, Massachusetts

DWD:gcb

### **[ENDNOTES]**

<sup>1</sup> Italics are as they appear in the Summary Plan Description.

<sup>2</sup> Respondent does not admit that this occurred, but for the limited purpose of this Motion, considers the allegation of its occurrence in the light most favorable to him.

<sup>3</sup> Prior to 1992, the period for filing a complaint was thirty (30) days.

<sup>4</sup> The plan in question and the Benefits thereunder are governed by ERISA, and that law, besides pre-empting other laws with regard to the determination of plan Benefits and their administration, requires that plan Benefits must be determined and provided to

employees in compliance with the terms of the plan on penalty of substantial penalties for such non-compliance.

<sup>5</sup> The Final Order herein shall be issued by the Administrative Review Board and the Board will establish an appropriate briefing schedule for the parties.